UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

MACY'S WEST STORES, INC. **Employer** **AND** **TEAMSTERS LOCAL 287** **Petitioner.**	**NLRB Case No.: 32-RC-246415** **MACY'S WEST STORES, INC.'S STATEMENT IN OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION**

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I. INTRODUCTION.

Macy's West Stores, Inc. (the "Employer" or "Macy's"), by and through its undersigned counsel, hereby files this Statement in Opposition to Petitioner Teamsters Local 287's ("Union")[1] Request for Review[2] of the Regional Director's Decision on Exceptions to Hearing Officer's Report and Certification of Results of Election issued by Region 20 ("Region") on January 10, 2020.[3]

The Union's Request does not meet the requirements necessary for Board Review and should be denied. Section 102.67(d) of the *Board's Rules and Regulations* provides limited circumstances where the Board will grant review of the Regional Director's decision in representation cases:

> (d) [t]he Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
> (1) That a substantial question of law or policy is raised because of:
> (i) The absence of; or
> (ii) A departure from, officially reported Board precedent.
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Although the Union claims to base its Request on prongs (1) and (2) above, as demonstrated below, its allegations do not meet these standards. First, the Region closely followed controlling Board precedent. The Region correctly applied *The Boeing Company*, 368 NLRB No. 67 (2019) ("*Boeing*") to determine whether the challenged employees should be

[1] The Union and the Employer are collectively referred to as the "Parties."
[2] The Union's Request for Review is referred to as the "Request."
[3] The Regional Director's Decision issued on January 10, 2020 is referred to as the "RD Decision."

included in the petitioned-for unit. As part of that analysis, the Region painstakingly analyzed each of the eight traditional factors used to determine whether a community of interest exists between the challenged ballots and the petitioned-for unit. Only after analyzing each factor, did the Region determine that the majority of the factors weighed in favor of excluding the challenged ballots.

To combat this finding, the Union alleges that because the Region cited, ***but did not follow***, the standard set forth in an accretion case, by stating that two of the factors were more important than the others, this error was significant and requires the Board to review the Region's decision. The Union is wrong. As noted above, the Region thoroughly analyzed ***each*** community of interest factor to base its conclusion that the challenged ballots did not share a community of interest with the petitioned-for unit. There simply is no evidence the Region gave any one factor more weight than another. The mistaken citation is, at worst, a "harmless error" that does not meet the high standards necessary for the Board to grant review. As such, the Region did not misapply *Boeing*.

Second, the Region's factual findings regarding the community of interest standards were accurate and based on the evidence presented by the Parties. For instance, the Union attempts to cast doubt on the Region's findings by downplaying certain skills of Jewelry Clerical ("JC") Support colleagues, even though there is no evidence in the record demonstrating that these skills are not special or require specific training. By oversimplifying the tasks performed, the Union alleges this factor weighed in favor of inclusion in the petitioned-for unit. Similarly, the Union alleges that because there may be instances where ***salespeople*** – who are not part of the petitioned-for unit – accompany a customer to the Jewelry Department to purchase pieces of jewelry, this meets the functional integration factor, finding in favor of inclusion in the unit.

However, there is no evidence demonstrating that this is done on a "regular" basis as alleged by the Union, and no evidence that this type of interaction occurs between JC Support colleagues and employees in the petitioned-for unit. Additionally, the Union alleges that JC Support colleagues share frequent contact with other employees and this factor also weighed in favor of inclusion. However, the Union's analysis is flawed as the Union fails to provide the full facts demonstrating the lack of frequent contact with employees in the petitioned-for unit.

Third, the Region did not misinterpret the "also eligible" clause in the Parties' Stipulated Election Agreement ("Agreement"), and correctly concluded that the challenged ballots of Sonja Roberts ("Roberts"), Madelynn Martinez ("Martinez"), and Emma Naranjo ("Naranjo") should not be counted. Contrary to the Union's flawed position, after determining that the eligibility portion of the Agreement was ambiguous on its face, the Region's analysis of the "also eligible" language correctly applied Board law and contract interpretation principles. Therefore, without evidence of the Parties' intent in interpreting the Agreement's eligibility provision, the Region correctly concluded that the Board was demonstrating best practices pursuant to the *Board's Casehandling Manual for Representation Proceedings* by including the eligibility formula within the Agreement.

Lastly, the Union claims there is an absence of Board precedent to support the Region's findings that *Butler Asphalt, LLC*, 352 NLRB 189 (2008) ("*Butler Asphalt*"), applies to this case because the Union alleges the Agreement is ambiguous on its face and *Butler Asphalt* only applies in circumstances where the Agreement is unambiguous. To support its argument, the Union misconstrues the Region's findings regarding the Agreement. The Union conflates two separate provisions of the Agreement: the "also eligible to vote" provision and the separate, exclusions provision, which explicitly lists "all other employees" (including sales associates like

Roberts) and "VP Merchandising Associates" (including Naranjo and Martinez). However, the Region never contends that the *exclusions provision* of the Agreement is ambiguous; it only found the eligibility provision to be ambiguous. As such, the focus is on whether the phrase "also eligible to vote" would otherwise make an excluded employee eligible to vote. Since the Agreement is clear, *Butler Asphalt* is applicable. Under *Butler Asphalt*, the Union has the burden to prove that the employer made a deliberate attempt to gerrymander the election results. Only then can the Region examine the employees' bona fide job titles. Here, there is no evidence of gerrymandering in the record, so the job title analysis was unnecessary, and the Region correctly applied *Butler Asphalt*.

Thus, based on the arguments set forth below, the Region's conclusions are correct, and the Union's Request should be denied.

II. PROCEDURAL BACKGROUND.

Pursuant to the Hearing Officer's Report ("Report") issued on November 19, 2019, the Union filed a Petition for Election on August 12, 2019. Report, at 2. The Petition sought to represent all support, support dockworkers, support merchandisers, support signers, and support expeditors, at four Macy's locations: Eastridge, Oakridge, Valley Fair, and Stanford. Report, at 2. On August 22, 2019, the Parties entered the Agreement. Report, at 2. Under the Agreement, the Parties agreed that the following unit was appropriate for the election:

> All full-time and regular part-time PB Merchandising Associates, Merchandising Associates, Pricing Associates, Receiving Associates, Signing Associates, Visual Merchandisers, Shoe Expediters, Merchandising Flex Associates, Cosmetics Macy's Paid Stock Associates, Pricing Flex Associates, Receiving Flex Associates, Signing Flex Associates, Pricing Team Leads, Receiving Team Leads, Shoe Expediter Leads, Signing Team Leads, and Support Team Leads employed by the Employer at its facilities located at 2801 Stevens Creek Boulevard, Santa Clara, CA, 3051 Stevens Creek Boulevard, Santa Clara,

> CA, 925 Blossom Hill Road, San Jose, CA, 2210 Tully Road, San Jose, CA, and 300 Stanford Shopping Center, Palo Alto, CA; **excluding all other employees**, employees represented by a labor organization, **VP Merchandising Associates, Cosmetics VP Stock Associates**, confidential employees, office clerical employees, guards, and supervisors as defined in the Act. (Emphasis added).
>
> Also eligible to vote are employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

RD Decision, at 1.

On September 4th and 5th, the Board held an election. RD Decision, at 1. There were 90 votes cast for the Employer and 86 votes cast for the Union. RD Decision, at 2.

Twenty votes were challenged, and the Union filed objections to the election shortly thereafter. RD Decision, at 2. The challenged votes were determinative in the election, and therefore required further analysis on whether the votes should be included. RD Decision, at 2. Through a series of negotiations between the Employer and the Union, the Parties narrowed down the challenged ballots to six. RD Decision, at 2.

On October 7th and 8th, the Parties attended a hearing on the challenged ballots and filed post-hearing briefs. Report, at 3. On November 19, 2019, the Hearing Officer issued her report, concluding that none of the challenged ballots would be counted. RD Decision, at 2. The Report found that JC Support colleagues were not eligible to vote because they did not share a community of interest with the otherwise stipulated unit. RD Decision, at 2. Further, the Report found that employees Naranjo, Roberts, and Martinez were not eligible voters as described in the Agreement. RD Decision, at 2. The Hearing Officer recommended that the challenged ballots not be counted. RD Decision, at 2. The Union filed its exceptions to the

Hearing Officer's Report on December 17, 2019 and the Employer timely filed an Answering Brief.

On January 10, 2020, the Region issued its decision on the Union's exceptions. The Regional Director affirmed and adopted the Hearing Officer's findings. RD Decision, at 2. On February 6, 2020, the Union filed its Request.

III. LEGAL ANALYSIS.

The Board should deny the Union's Request. Globally, the Union's Request is improper. The Union fails to provide "a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument." *Rules & Regulations*, § 102.67(e). Without a self-contained Request, the Union forces the Board to grossly assume facts not in the Request, which would consequently lead the Board to make an inaccurate rule in this case. As demonstrated below, the Employer cites to the record to provide the full facts needed to understand the misstatements made in the Union's Request.

The Union cherry-picks various transcript citations out of context to support its grounds for the Request. None of the facts cited by the Union support its contention that the Regional Director erroneously found that JC Support colleagues should be excluded from the bargaining unit. The Regional Director properly agreed with the Hearing Officer that JC Support colleagues do not share a community of interest with the petitioned-for unit. Although the Hearing Officer cited to the wrong precedent in her analysis (an accretion case), the Regional Director correctly found that the citation error was harmless since the Hearing Officer did not rely or apply the mis-cited precedent. Rather, the Hearing Officer analyzed and followed the correct standard set forth in *Boeing*, 368 NLRB No. 67 (2019) and properly weighed *all* the community of interest factors to find that JC Support colleagues were properly excluded from the unit. Contrary to the

Union's allegations, there is no evidence that the Hearing Officer gave any one factor more weight than the others, which the Regional Director confirmed in its Decision.

Second, the Regional Director correctly concluded that the Hearing Officer properly analyzed step one of the three-part unit test set forth in *Boeing*. Therefore, as explicitly cited in *Boeing,* the step two analysis is not required. Nonetheless, the Union now wants the Board to redefine how the *Boeing* test is analyzed and make all three steps required to determine if a bargaining unit is appropriate. This is why the Union keeps raising the issue that the Regional Director and the Hearing Officer allegedly did not properly analyze step two of the *Boeing* standard. This Board is not required to analyze this case under step two of the *Boeing* test, doing so would be a huge deviation from current precedent, and the Union has failed to provide convincing evidence for why the Board should deviate from this precedent.

Third, the Union presents no additional support for its contention that the Regional Director misinterpreted the "also eligible" language of the Parties' Agreement. The Regional Director properly agreed that the Hearing Officer correctly applied Board law and contract principles.[4] Without evidence regarding the Parties' intent in interpreting the Agreement's eligibility provision, the Hearing Officer had no choice but to assume that the Board was demonstrating best practices pursuant to the *Board's Casehandling Manual for Representation Proceedings* by including the eligibility formula within the Agreement.

[4] In its Post-Hearing Brief, the Employer maintained the Parties' Agreement was clear and unambiguous such that the principles of *Halstead Communications* applied. 347 NLRB 225 (2006). That is, the Board will hold the parties to the agreement and will not entertain arguments or challenges to undermine what the parties' agreed to in their stipulation. *Id.* at 226. The Employer still contends the eligibility language of the Parties' Agreement is unambiguous. Thus, although it does not agree that the "also eligible" language is ambiguous, the Employer avers that the Hearing Officer's analysis and application of Board precedent and contract interpretation principles are correct, as is the Board's adoption of this analsyis.

Finally, contrary to the Union's allegations, *Butler Asphalt, LLC*, 352 NLRB 189 (2008) applies to this case because the contested provision is not ambiguous, and *Butler Asphalt* specifically addresses the misclassification of employees based on their job title – the very issue raised by the Union. Since the Hearing, the Union has claimed that the Employer misclassified employees Sonia Roberts, Emma Naranjo, and Madelynn Martinez. The Union cannot now claim that *Butler Asphalt*, a misclassification case, does not apply to a misclassification issue by alleging the Agreement is ambiguous when there is no evidence of such a finding. Under *Butler Asphalt*, the Union has the burden to prove that the employer made a deliberate attempt to gerrymander the election results, which the Union failed to do. Thus, for the below reasons, the Board should deny the Union's Request.

A. The Regional Director Correctly Concluded Under Step One Of The *Boeing* Standard That JC Support Colleagues Do Not Share A Community Of Interest With The Petitioned-For Unit And Are Ineligible To Vote.

The Regional Director correctly affirmed the Hearing Officer's conclusion that JC Support colleagues do not share a community of interest with the petitioned-for unit under *Boeing*. RD Decision, at 4. As such, the challenged ballots of JC Support colleagues, Robin Cobarrubias ("Cobarrubias"), Mary Einspahr ("Einspahr"), and Vi Thi Tram ("Tram") were not counted. RD Decision, at 6; Report, at 8, 10.

In *Boeing*, the union attempted to argue that Flight-Line Readiness Technicians (FRTs) and Flight Line Readiness Technician Inspectors (FRTIs) should be in a unit together, which the Board denied. 368 NLRB at 2-4. In *Boeing*, the Board confirmed the return of the "traditional community of interest" test to determine whether an appropriate unit existed between the FRTs and FRTIs and explained how to evaluate each step of the *Boeing* analysis. *Id.* at 8-9.

An appropriate unit is determined by considering the following three steps:

(1) the proposed unit must share an internal community of interest;

(2) the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed; and

(3) consideration must be given to the Board's decisions on appropriate units in the particular industry involved.

Id. at 11.

If the Board finds that the unit does not share a community of interest with the petitioned-for members, the Board is not required to proceed to steps two and three of the analysis. The *Boeing* Board explicitly states, **"Lacking an internal community of interest, the petitioned-for unit is inappropriate at the first step, and we need not continue the analysis any further."** *Id.* at 18. (emphasis added).

Step one of the *Boeing* test requires the Board to consider whether the employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *See id.* at 4-6; Report, at 8-9. The Board considers all the factors together and no single factor is controlling. *See id.*; Report, at 9.

Here, the Regional Director found that under step one of the *Boeing* analysis, the Hearing Officer weighed all (not some) of the community of interest factors and did not give any one factor more weight than another factor. After analyzing each factor, the Hearing Officer found that JC Support colleagues should be excluded from the bargaining unit because they do not share a community of interest with the petitioned-for unit.

The Union concedes that JC Support colleagues are organized into a separate department, do not have employee interchange with those employees in the petitioned-for unit, and have separate supervision. Request, at 5. Further, contrary to the Union's contentions, the evidence shows that JC support colleagues do not share the skills and special training, functional integration, or frequent contact with the petitioned-for unit. RD Decision, at 5. This means seventy-five percent (75%) of the factors weigh against finding that JC Support colleagues have a community of interest with the bargaining unit members. Given this finding, under Board law, the Regional Director correctly declined to advance to steps two and three of the *Boeing* analysis.

Moreover, while the Union warns that "proliferation" of units is historically disfavored, and should be avoided, *Boeing* does not prevent multiple units from being created. As the Regional Director explained, there are instances, especially in retail, that require multiple units:

> As discussed in *Sterns, Paramus,* supra at 801, the Board has found separate units such as "restaurant, bakery, office employees, alteration department, display employees, and carpet installers warehouse employees, building service employees, beauty salon employees, and truckdrivers" (citations omitted) to be appropriate. **However, combining various categories of nonselling employees into one proposed unit predicated "on the single negative characteristic that none of the included employees performs any selling functions" is insufficient to overcome the diversity of interests among employees in an otherwise random grouping of heterogeneous classifications.** *The Grand,* 197 NLRB 1105, 1106 (1972).

RD Decision, at 5. (emphasis added). As demonstrated below, the challenged ballots and the petitioned-for unit do not share a community of interest, and should not be combined into the same unit simply to avoid multiple units within Macy's.

1. *The Regional Director Correctly Affirmed That JC Support Colleagues Have Distinct Skills And Training From The Employees In The Petitioned-For Unit.*

Here, the Union accuses the Hearing Officer of taking facts out of context to find that JC Support colleagues have distinct skills and training from the employees in the petitioned-for unit. However, it is the Union who uses the testimony of Cobarrubias, a JC Support colleague, out of context to support its position. Again, on this basis alone, the Board should deny the Union's Request because it failed to submit all relevant evidence on this point for the Board to objectively consider. Despite the Union's characterization of Cobarrubias' testimony as "explicitly downplaying" any special skills JC Support colleagues have, the Regional Director affirmed the Hearing Officer's conclusions because the record is clear that JC Support colleagues have distinct skills and training as compared to the support employees. Request, at 6.

a. JC Support Colleagues Have Special Skills And Knowledge That Support Employees Do Not Have.

The Hearing Officer found that JC Support colleagues have distinct skills and training from other employees because they receive jewelry-specific training, undergo more rigorous background checks, and operate special tools such as ring sizers, Kevlar covers, and diamond testers. Report, at 9. The Hearing Officer's conclusions are consistent with Board precedent in determining whether employees with special skills and training share a community of interest with bargaining unit members.

Consider *Cargill Meat Solutions Corp. and Int'l Bhd. of Elec. Workers, Local Union 494*, 2010 NLRB Reg. Dir. Dec. LEXIS 123, *27-29 ("*Cargill*"). The regional director in *Cargill* found that janitors had an insufficient community of interest with the Employer's maintenance employees. *See id.* Specifically on skills and training, the Regional Director found that, "[T]he

clear difference in skill level is also reflected by the fact that there is no job interchange between the janitors and the maintenance employees – *i.e.* janitors do not fill in for maintenance mechanics and electricians and vice versa." *Id.* Having a special skill set is not about whether anyone has the *ability* to do the skill. *See id.* Having a special skill apart from the bargaining unit is about whether bargaining unit members *actually* perform these special skills. *See id.* In *Cargill,* the janitors did not perform maintenance skills and maintenance employees did not perform janitorial functions, and therefore, these employees could not be in the same bargaining unit. *See id.*

Here, just like in *Cargill,* the JC Support colleagues are trained to have a special skill set that the bargaining unit employees do not have. Heather Stallion, former Regional Jewelry Director for the Northwest Region from 2016-2019, testified that JC Support colleagues are specially trained on fine jewelry knowledge, operations and product knowledge. Tr. 206:2-22; 363:7-13. As Regional Director, Stallion supervised the District Director of the Jewelry Complex, who supervised the Jewelry Business Manager. Tr. 204:21-24; 205:2-9. In addressing Stallion as simply a "Store Manager," which was her position at the time of the Hearing, the Union fails to ever state that Stallion was the Regional Jewelry Director for almost three (3) years. Stallion had been in the Store Manager position for only eight months at the time of the Hearing. Tr.201:15-18. Thus, contrary to the Union's position, Stallion unmistakably had extensive knowledge regarding the Jewelry Complex, understood the job duties and training these employees received, and was qualified to testify regarding the responsibilities of the JC Support colleagues, especially since she managed them for three years. Tr. 204:21-24; 205: 2-9.

A JC Support colleague is knowledgeable on the jewelry brands carried at Macy's and can consult and provide the customer with exceptional service for their jewelry needs, including speaking about the merchandise and providing helpful recommendations, pricing, fitting, and diamond testing. Tr. 363:7-13; 20-25. JC Support is so specialized that Cobarrubias testified that if she were to go on vacation, no one would do her work because she is the only person who can do her work. Tr. 123:4-5.

The Union tried to minimize JC Support colleagues' special knowledge by claiming that their expertise is no different in degree than Cosmetics Paid Stock Associates ("CVPSAs"), and seemingly, they should be included in the unit. However, this argument is misplaced, as the Parties' agreement specifically excludes CVPSAs because they do *not* share a community of interest with the support employees. Support employees do not have the same skills or do the same job duties as CVPSAs. Tr. 70:2-5; 72:2; Tr. 76:21-25. Therefore, if JC Support colleagues have the same level of expertise as CVPSAs as the Union suggests, JC Support colleagues do not share a community of interest with the support employees.

b. JC Support Colleagues Have Different Security Clearances That Support Employees Do Not Have.

Under Board law, employees who have different levels of security or work access cannot be found to share a community of interest with each other. *Guide Dogs for the Blind, Inc.*, 359 NLRB 1412, 1417 (2013). Similarly, in *Renaissance Hotel Assocs.*, 1992 NLRB LEXIS 1146, at *51-52 (1992), the Board held that there was no community of interest where separate positions had different levels of computer access and there was no evidence that they had the computer codes necessary to permit them to perform each other's jobs.

Further, just like *Renaissance*, JC Support colleagues are set apart from other bargaining unit members because of their security clearance. Due to the valuable nature of the jewelry, JC Support colleagues are specially trained on fine jewelry knowledge and operations, as well as product knowledge. Tr. 206:2-22. This includes specialized training on asset protection to protect the jewelry from theft. Tr. 363:7-13. Specifically, as confirmed by Stallion, JC Support colleagues receive training from the fine jewelry operations and from the Jewelry Business Manager. Tr. 206:7-20. This training is done through both in-person and computer-based training, specifically regarding the Jewelry Complex. Tr. 206:7-20. The JC Support colleagues are trained as follows:

> So the jewelry team is trained by fine jewelry operations on all of our compliance standards. So key control, and the different types of equipment, such as, you know, the – having the right type of glass and everything. As well as ensuring that we never leave the jewelry department unattended.

Tr. 363:7-13.

Regarding high value assortment jewelry, the JC Support team is specially trained as follows:

> So within the jewelry department, when we're showing a high-value assortment, we would call and let asset protection know. And they are – the jewelry colleagues are all trained on, you know, like I had said, the details of our compliance, which, you know shoplifting, asset protection in general, is a big focus.

Tr. 363:20-25.

This preemptive measure is unique to the Jewelry Department. No other department preemptively calls Asset Protection when showing items to a customer. In fact, the jewelry colleagues are required to call Asset Protection by dialing 7-911 prior to showing high-value merchandise. In contrast, support colleagues would call 7-911 only if there was suspicious

activity. Tr. 388:20-23. This preemptive call is made so that Asset Protection can be near and can watch when high-value merchandise is taken out of its case and shown to customers. Tr. 364:12-15.

Additionally, JC Support colleagues receive a different screening and background check. Because of this, support colleagues cannot assist JC Support colleagues in processing jewelry merchandise due to security reasons. Tr. 206:2-22; 363:7-13. This is due to the high level of clearance JC Support colleagues have because jewelry is under lock and key and only jewelry associates have access to the safe. Tr. 207:14-25.

As Stallion testified, there are no SENSOs (which are sensors typically put on clothing to prevent theft) on jewelry because this would make it look ugly. Tr. 314:1-13. Therefore, JC Support colleagues must abide by their own protection plan. Tr. 363:20-25; 364:12-15. Also, every morning JC Support colleagues must inventory the jewelry and compare it to the inventory completed the night before. Tr. 363:20-25; 364:12-15. If there is jewelry missing, the JC Support colleague is required to dial 7-911 from the Macy's business phone to contact asset protection. Tr. 363:20-25; 364:12-15. In other departments, if there is loss or theft, the sales or support colleague is required to inform their manager of the potential theft first, and the manager may dial 7-911 to contact asset protection. Tr. 363:20-25; 364:12-15. Due to the highly sensitive and expensive nature of jewelry, JC Support colleagues are trained to contact and communicate with the Asset Protection directly, which no other colleague is trained to do, which happens several times per day because of the unique, preemptive nature of the Jewelry Department. Tr. 363:20-25; 364:12-15.

c. JC Support Colleagues Have Specific Tools That Support Employees Do Not Have.

Additionally, JC Support colleagues are the only employees who use the tools they use. In *Mallinckrodt, Inc. and Teamsters Local #693, Int'l Bhd. of Teamsters*, 2005 NLRB Reg. Dir. Dec. Lexis 445 ("*Mallinckrodt*"), the regional director found that housekeeping employees should be excluded from the production unit because they used different tools. 2005 NLRB Reg. Dir. Dec. Lexis 445 at *40-41. *Mallinckrodt* makes clear that tools are special if only certain employees use them, *regardless of how basic the tool is*. The housekeeping employees in that case used auto floor scrubbers, buffers, and snowplows. *See id.* Anybody could learn how to use these household tools. However, the regional director found that because only housekeeping used the tools, housekeeping did not share a community of interest with the production employees who did not use those tools. *See id.*

Here, contrary to the Union's position, not everyone can use JC Support tools. JC Support colleagues must be specifically trained on the tools that they use to perform their job functions. Tr. 219:23-25. With the exception of the handheld, the following tools are exclusive to JC Support colleagues and support workers do not use, or know how to use, these tools: diamond tester, ring sizing, the jewelry loop, jewelry POS systems, Kevlar equipment, jewelry iPad, and jewelry cleaner. Tr. 206:23-25; 27:1-2; 219:23-25; 220:1-2. These tools are used to protect the items in the Jewelry Department as well as to further the sale. For instance, JC Support colleagues use tools like the diamond tester to check for the authenticity of the jewelry in front of the customer to promote sales and to ensure the quality of the item being delivered to the store is what it purports to be. Tr. 307:24-25; 308:1-16. While some of the tools may not

require extensive training to use like the housekeeping tools in *Mallinckrodt*, each tool *does* require some training, which therefore makes it a special skill.

The Union completely fails to address that even if the tool is simple (*e.g.*, the diamond tester and ring sizer), training is still required and this training is *only* given to JC Support colleagues. In fact, while Cobarrubias testified that she uses the diamond tester by hitting the top of the diamond with it and that "anybody can do that," the Union fails to address the fact (1) that understanding the result of hitting the diamond with the tester is something the employee needs to be trained on so they can explain the outcome to the customer; and (2) that even if anyone can do it, which Macy's denies, *only* the JC Support colleagues in fact do it, analogous to the housekeepers in *Mallinckrodt*. Since these tools are unique to the Jewelry Department, support colleagues do not receive this training, do not understand how to use these tools, and do not have access to the tools (with the exception of the handheld).

Moreover, as discussed above, Stallion has extensive knowledge and expertise regarding the tools used by JC Support colleagues, including Cobarrubias and Le, and Stallion's testimony regarding the use of the tools was accurate and given the proper weight by the Region.

Thus, based on the above, the Regional Director correctly concluded that the Hearing Officer's determination that JC Support colleagues have special skills and training that is not provided to or possessed by those in the petitioned-for unit is correct. Accordingly, the Board should deny the Union's Request.

2. <u>The Regional Director Correctly Affirmed That JC Support Colleagues Are Not Functionally Integrated With The Petitioned-For Bargaining Unit</u>.

The Regional Director agreed with the Hearing Officer's analysis and concluded that no functional integration exists between JC Support colleagues and support workers. RD Decision, at 4. Here, the Union attempts to redefine functional integration. According to the Union, if JC Support colleagues receive ***mere*** support from bargaining unit employees, there is functional integration. This is not the law. The law provides that the greater the contact and dependency between employees, the greater the likelihood the Board will find functional integration between employees; minimal contact does not meet this standard. *See Casino Aztar*, 349 NLRB 603, 605 (2007).

The Union claims that JC Support colleagues have functional integration with the support employees because Cobarrubias testified that for *only* some jewelry items (*i.e.*, for fine watches and bridge jewelry), she has to go to the receiving dock to pick up the merchandise or wait for the receiving associates to deliver the merchandise to her. Again, this is the Union failing to present a self-contained Request to the Board. The Union purposefully leaves out critical details about JC Support colleagues' lack of integration with the support workers, and hinders the Board from reaching the correct conclusion and affirming the RD Decision.

JC Support colleagues must receive and process the jewelry into the store. Although the JC Support colleagues receive the fine jewelry from the receiving dock, only JC Support colleagues can process jewelry. Tr. 207:3-4. JC Support colleagues are the only employees who can process jewelry and do so only in the jewelry office located inside of the Jewelry Complex. No support workers can aid in processing the jewelry.

JC Support colleagues receiving only fine jewelry merchandise from receiving associates is the extent of their interaction with support employees. To determine if employees are functionally integrated, the Board can compare the purpose of the employees' work in and outside of the bargaining unit. Recall *Cargill*, the case where the regional director found that janitors had an insufficient community of interest with the Employer's maintenance employees. 2010 NLRB Reg. Dir. Dec. LEXIS at *27-29. The janitors' work included cleaning offices, floors, windows, bathrooms, locker rooms, break rooms, and general welfare areas. *See id.* The regional director found this type of work focused on cleaning and hygiene. *See id.* Contrastingly, the regional director found the maintenance employees' work focused on equipment, building maintenance, and repair because their work included working on equipment and machinery in the production buildings. *See id.* at *9-10; 27-29; 31-32. Since there was no functional integration in work by the janitors and the maintenance employees, the janitors were excluded from the bargaining unit that included maintenance employees.

Just as the regional director found no community of interest in *Cargill* because the janitors were focused on cleaning instead of maintenance and equipment, there is no community of interest between the JC Support colleagues and the support employees. The JC Support colleagues' purpose is to service the Jewelry Department, not to merchandise the general store like the support employees. To further illustrate this point, consider the daily tasks of JC Support colleagues, none of which the support employees do.

JC Support colleagues start the day with opening procedures. In the morning, the JC Support colleagues remove the Kevlar case covers from the night before. Tr. 327:8-14. Support workers do not aid in this task. Tr. 327:8-14. After the case covers are removed, the JC Support colleagues do case counts (also known as inventorying the jewelry), to ensure that the jewelry

items in the counter match the inventory from the night before. Tr. 364: 24-25; 365: 1-5. If there is an issue regarding loss of jewelry, the JC Support colleagues call loss prevention. No support workers assist in this process, nor are they allowed to do so. Further, JC Support colleagues must participate in morning huddles, with the Jewelry Complex selling colleagues, which is led by the Jewelry Business Manager. Tr. 208:4-15. Again, support colleagues are not involved in these morning huddles.

In addition to receiving and processing jewelry from the receiving docks during their opening shifts, the JC Support colleagues must process diamond deliveries. For diamonds, the JC Support colleagues receive the diamonds via UPS (not through the receiving associates). JC Support colleagues must sign for diamond deliveries. Tr. 105:15-20. No other colleagues receive deliveries directly from UPS. Tr. 105:15-20. UPS goes to the "case line," which is in the Jewelry Complex, directly outside the jewelry office, and the JC Support signs for the jewelry. Tr. 105:16-21. Unlike support colleagues, JC Support colleagues have signing authority to receive the jewelry merchandise. Tr. 217:19-24. Once received, the JC Support colleague takes the merchandise and processes it in the JC Support office. Only jewelry clerical employees can access the office. Tr. 104:2-10. Once processed, JC Support colleagues put the fine jewelry in the safe for added security, and only JC Support colleagues and other jewelry sales associates have access to the safe. Tr. 110:11-22; 207:19-25.

Further, JC Support colleagues are the only workers who process special or custom orders. Tr. 208:15-18. To process such orders, JC Support colleagues must heavily interface with customers by calling customers, working with customers in store, and connecting with the vendor to find out delivery times. Tr. 208:15-18. Support workers are not responsible for processing special orders. Tr. 208:15-18.

Support colleagues are not responsible for receiving the jewelry merchandise and processing it, and do not know how to do these functions. Tr. 119:15-24; 218:8-20. Support colleagues do not receive merchandise in the same manner from the docks and do not receive direct deliveries from UPS they need to sign for as JC Support colleagues do. Support colleagues do not have access to the safe that holds the jewelry. Tr. 119:22-25; 120:1-5. JC Support colleagues do these opening functions and daily tasks on their own without any assistance from the support colleagues. Tr. 119:22-24. This means that the only people the JC Support colleagues interact with to perform their duties are themselves and sales associates who work in the Jewelry Department.

Based on the above, the RD Decision correctly confirmed that the minimal contact that JC Support colleagues have with the support colleagues does not rise to the level of functional integration. Therefore, the Board should deny the Union's Request.

3. JC Support Colleagues Have Functional Integration And Frequent Contact With Sales Employees Because The Employer Classifies JC Support Colleagues As Sales.

Throughout the Union's Request, the Union poses a red herring argument to attempt to diminish the Regional Director's credibility. The Union claims that the Regional Director is wrong for concluding that there is a "lack of functional integration between employees in the Jewelry Department and employees in the rest of the store" because JC Support colleagues regularly interact with salespeople. Request, at 8. The Union misstates the Regional Director. The Regional Director concluded that the JC Support colleagues do not have contact and functional integration with the *Unit employees*. RD Decision, at 4. The Region did not address whether JC Support colleagues have functional integration with sales employees. RD Decision, at 4.

As for the Union's allegation that salespeople "regularly accompany" customers to the Jewelry Department, there is no evidence in the record that this occurs on a "regular" basis. Rather, this is the Union's belief based on Stallion's testimony that salespeople may coordinate with the Jewelry Department. However, Stallion does not quantify how often this occurs. Further, even if JC Support colleagues have "regular" interactions with sales employees, it further supports the Regional Director's conclusion that JC Support colleagues must be excluded from the bargaining unit. The Hearing Officer confirmed that the Parties' agreement provides that sales employees are excluded from the unit. Bd. Ex. 1. Although the Hearing Officer and Regional Director did not analyze whether JC Support colleagues are sales employees, the record provides that Macy's classifies JC Support colleagues as sales employees. Tr. 158:14; 203:21-25; Report, at 9.

Former Regional Director of Jewelry, Heather Stallion, testified that the Jewelry Department is part of the Jewelry Complex (including fine jewelry, fashion jewelry, and watches), which is part of the selling organization that rolls up to the total National Jewelry Strategy. Tr. 204:16-18; 207:8-9. JC Support colleagues are part of the sales budget, not support. Tr. 158:14; 168:15-18. Further, JC Support colleagues are sales employees because they ring up purchases and interface with customers, which are "front of the house" tasks. Tr. 158:14; 203:21-25. Support employees are not classified as sales employees because they do not interact with sales employees.

As above-mentioned, the Regional Director correctly affirmed the Hearing Officer's analysis and concluded that no functional integration exists between JC Support colleagues and support workers. The Regional Director mentioned nothing about JC Support colleagues not being integrated with other employees, such as sales employees.

4. <u>The Regional Director Correctly Affirmed That The JC Support Colleagues Do Not Have Frequent Contact With The Bargaining Unit Employees</u>.

The Regional Director agreed with the Hearing Officer's analysis and concluded that JC Support colleagues and support workers have minimal to no contact with each other. RD Decision, at 4. Again, the Union attempts to redefine the law to define "frequent contact" as "theoretical contact" between JC Support colleagues and bargaining unit members. In other words, the Union claims that if JC Support colleagues *could* frequently interact with bargaining unit members by virtue of their minimal presence around support workers, then frequent contact exists. This is not the case law and untrue. In fact, in *Essex Wire Corp.*, 130 NLRB 450, 453 (1961) the Board found that just because employees may physically be around each other does not mean that they frequently interact with each other. *See id.* In *Essex*, the Board found no community of interest even if jobs are "virtually interchangeable" where there was, in fact, no evidence of *actual* interchange or contact. *See id.*

Again, the Union failed to submit all relevant evidence on this point to the Board, and for this reason, the Board should deny the Union's Request. Contrary to the Union's minimal recitation of Cobarrubias' testimony, Cobarrubias did not testify that she "has regular contact" with bargaining unit members. Tr. 108:1-15. Cobarrubias only testified that she is only on the dock for the mere purpose of putting out her trash because the dock is the designated place for garbage. Tr. 108:1-15. Nowhere in her testimony did Cobarrubias testify that she has regular contact with the bargaining unit members on the dock. Tr. 108:1-15.

> Q: Do you know how it's done on the docks with other material other than for fine jewelry?
>
> A: Oh. Well, they have to open all their merchandise and tag them and hanger them, process them, like me.

Q: And after you –

Q: Well how do you know that that's what they do?

A: Because I'm always on the dock.

Q: Okay.

A: I have to take all my empty boxes to the dock and put them in the compactor. I have to take all my garbage to the dock and put it in the garbage. So I'm always in there.

Q: Okay. Thanks.

Tr. 108:1-15.

The Union extrapolates from Cobarrubias' testimony false facts. The truth is that JC Support colleagues go to the dock to put out the trash and to retrieve fine jewelry items only. As described above, JC Support colleagues process all the merchandise in the Jewelry Department – not on the docks, as support employees do.

Further, the Union again misconstrues Cobarrubias' testimony when it claims that JC Support colleagues make their signs in the same place as the merchandisers. Cobarrubias did not testify that she makes her signs in the same place as bargaining unit members. Rather, she stated that she gathers the signing materials from the sign shop and where the items are stored, which is the same place for all signing equipment in the store. Tr. 121:18-25. Cobarrubias did not testify that she made her signs there. In fact, Cobarrubias made clear that she does ***not*** interact with bargaining unit members at all when she does signing for JC Support:

Q: What's your responsibility with respect to signing?

A: **All of it. I do it all myself.** I have to do – every time there's a sale, which is probably every week, I have to print signs, I have to put them in their sign holders, I have to put the toppers on them, I have to go in every case, which is about 50 cases, and change the signs.

Q: And are – is there signing throughout the rest of the store?

A: Yes.

Q: And do you do –

A: The signers do that.

Q: You don't have any responsibility for that?

A: No.

Tr. 111:2-14 (emphasis added).

Even if some employees in the petitioned-for bargaining unit are present when Cobarrubias goes to retrieve her signing items, this would not constitute "frequent interaction" as defined by Board precedent. Accordingly, if the Board finds that JC Support colleagues sometimes "rub elbows" with bargaining unit employees when they retrieve their signs from the sign shop, it would be a gross assumption and departure from the *Essex* precedent to find that JC Support colleagues have frequent contact with the bargaining unit members based on "virtual interchange." Cobarrubias admitted that to carryout her duties, she remains in the Jewelry Department except for breaks, to go to the printer (because the one in her department is broken, and which is not used to make signs), and to take out the trash. Tr. 117:22-25; 118:1-2; 121:11-15. Aside from these instances, Cobarrubias remains in the Jewelry Complex. Thus, contrary to the Union's contention, Cobarrubias' testimony does not sound like an "employee who spends the vast majority of time isolated in the jewelry area." Request, at 9. Based on the above facts, the Board should deny the Union's Request.

B. The Regional Director Correctly Concluded That The Hearing Officer Did Not Exalt Certain Community Of Interest Factors Over Others To Find That JC Support Colleagues Are Excluded From The Petitioned-For Unit.

The Regional Director correctly concluded that the Hearing Officer properly analyzed step one of the *Boeing* test, and properly found that JC Support colleagues were excluded from the unit. RD Decision, at 3-4. Although the Hearing Officer cited to the wrong precedent in her analysis, the Regional Director correctly found that the citation error was harmless. RD Decision, at 3-4. The Hearing Officer used the correct standard under *Boeing* and properly weighed all the community of interest factors (not just some) to find that JC Support colleagues were properly excluded from the unit. RD Decision, at 3-4.

As affirmed by the Regional Director, the Union wrongly assumes that because the Hearing Officer referenced *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270 (2005) **one time** in her report, that she inappropriately gave extra weight to the factors of interchange and supervision in making her determination that the JC Support colleagues do not share a community of interest with the petitioned-for unit. RD Decision, at 3-4. However, there is no support for the Union's position in the Report. In fact, it is clear from the Hearing Officer's detailed community of interest analysis that **each** factor was analyzed and considered in reaching her conclusion. RD Decision, at 3-4; Report, at 9-10.

The Hearing Officer only ***cited*** to *Frontier*, but did not rely on the case to make her determination, focusing instead on the application of *Boeing*. RD Decision, at 3-4. Had she relied on the case, she would have focused solely on the factors of interchange and supervision, or noted that extra weight was given to these factors when she analyzed them. RD Decision, at 3-4. However, this was not done. Quite the contrary, and as above-noted, the Hearing Officer provided an analysis of all the factors, not just two. RD Decision, at 3-4. Specifically, the

Hearing Officer explicitly stated, "[m]oreover, **most of the factors** weigh against finding an internal community of interest, including the two most important factors of common supervision and interchange." Report at 10. (emphasis added). Thus, the Hearing Officer relied on all the factors, not just the "two most important" ones. Report at 10. Accordingly, the Regional Director found that the Hearing Officer's analysis of the community of interest factors was appropriate for the current representation case. Therefore, the Board should deny the Union's Request.

C. The Regional Director Correctly Declined To Analyze Step Two Of The *Boeing* Test.

The Union attempts to change Board precedent by pressuring the Board to require analysis of all three *Boeing* steps before determining whether a unit is appropriate. This is not the law, and the Regional Director, without further analysis, correctly declined to analyze step two under *Boeing*. RD Decision, at 4.

Step two of the *Boeing* analysis requires the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit to be comparatively analyzed and weighed. 368 NLRB at 12. However, once a unit is deemed inappropriate under step one of the *Boeing* analysis, step two is not required. *See id.* at 13, 18. The *Boeing* Board explicitly states, **"Lacking an internal community of interest, the petitioned-for unit is inappropriate at the first step, and we need not continue the analysis any further."** *Id.* at 18; emphasis added.

Despite the fact that the Hearing Officer's analysis under step two of the *Boeing* standard was unnecessary, she nonetheless performed the analysis and correctly concluded that JC Support colleagues do not share a community of interest with the petitioned-for unit. The Union

muddles the Hearing Officer's conclusion and cites her Report out of context to cause unnecessary confusion. For instance, the Union poses the frivolous question:

> Why, when presented with three groups of employees – Group 1, those included in the Union's petitioned-for unit; Group 2, the JC Support employees; and Group 3, the VP Merchandisers, and Cosmetic VP Stock Associates – who share the same terms and conditions of employment and job functions, but can be distinguished by the same community of interest factors (functional integration, interchange, supervision, etc.), did the Hearing Officer decide that Group 1 and Group 2 *do not* share a community of interest, but Group 2 and Group 3 *do?*"

Request, at 13.

The Union further states "there is no obvious explanation for the Hearing Officer's decision" when in fact there is a clear reason for this analysis: the Hearing Officer is applying the identical analysis used in step two of the *Boeing* test. Request, at 13.

In *Boeing*, the Board held that the FRTs and the FRTIs shared a community of interest with other excluded employees on the employee's production line under step two of the analysis. 368 NLRB at 19-20.

> The petitioned-for unit's shared collective-bargaining interests with excluded employees by no means end there. FRTs are in the same department as **excluded** technicians, and FRTIs are in the same department as **excluded** inspectors. FRTs and FRTIs separately share overall supervision with excluded technicians and inspectors, respectively, including some immediate and secondary supervision. FRTs and FRTIs have meaningful similarities in job functions with **excluded employees**. A significant 14 percent of FRTs' and FRTIs' functions by time spent, and even more by SOIs performed, overlap entirely with work also performed by excluded employees–the rework and traveled work. Even a portion of the work that is exclusive to the Flight Line is at least similar to, if not redundant of, work performed by excluded employees earlier on the production line. FRTIs do not even exclusively perform this Flight Line work. Excluded inspectors sign off on 11 percent of it.

Id. (emphasis added).

Although there were differences between the FRTs and FRTIS as compared to the excluded unit, the similarities they shared were "far more significant than those that differentiate[d] them." *Id.* at 23. Here, the Hearing Officer uses the same analysis.

The JC Support colleagues (just like the FRTs and FRTIs) share a community of interest with the **excluded** VP Merchandisers and Cosmetic Vendor Paid Stock Associates ("CVPSAs"). "Like the employees in the otherwise stipulated unit, the VP Merchandisers and CVPSAs perform the same receiving, merchandising, and signing functions as JC Support employees." Report, at 10-11. When compared to the petitioned-for unit, the Hearing Officer (just like the *Boeing* Board) held that the similarities between the JC Support colleagues and the excluded employees outweigh their differences. Therefore, "because the petitioned-for unit does not share a community of interest that is sufficiently distinct from the interests of excluded employees, the unit is also inappropriate under the second step." *Boeing*, 368 NLRB at 23-24. Clearly, the Hearing Officer's voluntary analysis of step two is correct, and the Union's Request should be denied.

D. The Regional Director Correctly Adopted The "Also Eligible" Language In The Parties' Stipulated Election Agreement.

The Regional Director, without further analysis, correctly adopted the Hearing Officer's recommendation on the Parties' "also eligible" language. The Agreement provides in pertinent part:

> Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

RD Decision, at 1.

First, the Hearing Officer correctly determined that the Agreement's "also eligible" language was ambiguous. The Hearing Officer correctly analyzed this issue under *Caesar's Tahoe*, 337 NLRB 1096 (2002). The Board applies a three-part test to determine whether an individual whose ballot has been challenged should be included in a stipulated unit. *See id.* First, if the applicable stipulated agreement is unambiguous, the Board will simply enforce the terms as to a challenged ballot. *Id.* If the terms of the agreement are ambiguous, the Board looks to the intent of the parties via the normal methods of contract interpretation, including examination of extrinsic evidence. *Id.* If the parties' intent remains unclear, the Board applies the standard community of interest test. *Id.*

Under step one of the *Caesar's Tahoe* analysis, to determine whether a stipulated election agreement is ambiguous, the Board looks to whether the agreement specifically includes or excludes the employee in question. 337 NLRB at 1098. In other words, if the inclusion and/or exclusion of an employee is not clear from the face of the agreement, then the agreement is ambiguous. *See id.* This is the extent of the analysis. *See id.*

Here, the Parties' agreement arguably does not have a clear definition of the "also eligible" language on the face of the Agreement. Based on the Union's interpretation, the Agreement can only be interpreted to mean that any employee who performed bargaining work would be eligible to vote. Report, at 12. The Union argues that because the words "also eligible" cannot be read to be superfluous, the only reading of the "also eligible" clause is that it allows any employee who performs four hours of bargaining work per week to be included in the bargaining unit, no matter their assigned classification. Request, at 14.

However, as explained by the Hearing Officer, this is not the only plausible interpretation. This phrase could also be used to clarify who qualifies as a "regular part-time"

employee in the unit since the language sets forth the *Davison-Paxon* formula for determining part-time eligibility. Report, at 12; *citing Davison-Paxon,* 185 NLRB 21 (1970). Contrary to the Union's contention, this reading would not result in the phrase "also eligible" being superfluous. This is because the phrase "also eligible" clarifies the requirements that must be satisfied to be an eligible voter, in addition to holding one of the enumerated job titles. As noted by the Hearing Officer, the clause specifically limits eligibility: "[a]lso eligible to vote are **all employees in the unit** who have worked . . . ." Report, at 2, 12 (emphasis added). Under the Union's interpretation this limiting language would be superfluous if this provision allowed *any* employee who performed the required hours of bargaining work to be included in the unit.

Even more notable, if the Parties meant for this interpretation, there would be no reason to specify "all full-time and regular part-time" employees as part of the enumerated titles eligible to vote. Rather, the Parties would have instead used this four-hour requirement since it would obviously encompass *both* full-time and part-time employees performing those specified job duties for an average of four hours per week. This was clearly not the intent of the Parties. The Hearing Officer recognized this flawed reasoning and applied the more logical and correct analysis: this "also eligible" provision was used to reiterate that the *Davison-Paxon* formula would be used to determine eligibility, which also conforms with the Board's own best practices. Report, at 12-13.

Because the Hearing Officer correctly determined that this phrase is ambiguous, she correctly proceeded to step two of the *Caesar's Tahoe* analysis to show the Parties' intent in interpreting the eligibility language in the Agreement. As confirmed by the Hearing Officer, "the parties failed to introduce evidence at the hearing regarding their intent in including the clause." Report at 12. Therefore, the Hearing Officer correctly assumed that the Board was

following best practices "to set forth expressly in the election agreement the election eligibility formula to be utilized." Report, at 12. Otherwise, according to the Union's interpretation, the Hearing Officer should have assumed that the Board was not engaging in best practices, which is an illogical presumption. This is especially true in light of the above inconsistencies caused by the Union's interpretation.

Further contrary to the Union's interpretation, the Hearing Officer cites to *Automatic Fire Systems*, 357 NLRB 2340 (2013) as an example to demonstrate that it is best practices to spell out the eligibility formulas in any stipulated election agreement. As indicated above, the Hearing Officer relies on the Board's *Casehandling Manual for Representation Hearings*, which again assumes that the Board is following best practices and including the eligibility formula in the Agreement. Report, at 12-13. Furthermore, the ambiguous language at issue in *Automatic Fire Systems* is the same language at issue in the present case (*i.e.*, "also eligible to vote"). The Union attempts to downplay this analogous language by asserting that it is inappropriate to rely on *Automatic Fire Systems* since only part of the stipulated election agreement was cited in that case. As such, a direct comparison of *Automatic Fire Systems'* language and the language used in this case cannot be made. The Union's argument is disingenuous.

At no point in its analysis of this "also eligible to vote" language did the Union rely on any other portion of the Agreement. In fact, the only time the Union references another provision in the Agreement is when it states that if the "also eligible" language was meant to define the parameters of the petitioned-for unit, it would have appeared after the word "part-time" or additional language would have been added to clarify the definition of "part-time" employees. Instead, the Union spends almost the entirety of its arguments on the specific "also eligible to vote" provision in the Agreement. Obviously, by the Union's own analysis, the

entirety of the Agreement is not necessary to understand the precedential value of *Automatic Fire Systems* and its clear applicability to this case.

Moreover, the Union cannot demand that the Board grant its Request to reevaluate the Hearing Officer's interpretation of the "also eligible" clause when there is no evidence on the record regarding the Union's proffered interpretation or the Parties' intent of the same. Therefore, the Hearing Officer correctly determined that the Board was following best practices and spelling out the eligibility formula in the Agreement "only to clarify which employees in the job classifications listed in the unit description qualified as regular part-time employees rather than include all employees who performed unit work." Report, at 13. In light of this, the Union's Request should be denied.

E. The Regional Director Correctly Concluded That *Butler Asphalt* Applies To The Instant Case.

The Regional Director, correctly affirmed the Hearing Officer's finding that when a party argues that an employee has been misclassified, the Board will examine whether "bona fide job titles" fairly represent the employee's job function *only when there is evidence of gerrymandering*. Report at 13. The reason for this is simple: to provide parties with the predictability that an unambiguous stipulated election agreement will be enforced as written:

> The [*Butler*] Board noted invoking *Viacom* [*Viacom Cablevision*, 268 NLRB 633, (1984)] to look behind classifications to the work employees perform is inconsistent with the expectation, upon which the *Caesar's Tahoe* analysis is based, that the parties know the employees' job titles and intend the descriptions in the stipulation to apply to those job titles. The Board further explained that looking behind job classifications would compromise the predictability and finality afforded by the *Caesar's Tahoe* framework, under which employers and labor organizations can expect that their unambiguous stipulated election agreements will be enforced as written. Accordingly, absent evidence of gerrymandering, the Board will assume that employees are properly classified.

Report, at 13. (citations omitted).

The Union's interpretation of *Caesar's Tahoe* and *Butler Asphalt* completely contradicts the findings and purposes behind the case law.

The Union attempts to undermine the Hearing Officer's analysis by arguing that because the Hearing Officer found a portion of the Parties' Agreement to be ambiguous (*i.e.,* the eligibility provision of the Agreement), the misclassification standard set forth in *Butler Asphalt, LLC*, 352 NLRB 189, 191 (2008) does not apply because *Butler Asphalt* only applies to unambiguous agreements. However, the *Butler Asphalt* misclassification standard applies because the provision at issue here (*i.e.,* the eligibility provision) is not ambiguous.

The Union assumes that if the Hearing Officer finds a provision of a stipulated election agreement ambiguous, the Agreement is ambiguous in its entirety. This is not the correct interpretation of *Caesar's Tahoe*. In *Caesar's Tahoe*, the Board determined whether the parties' stipulated election agreement was ambiguous regarding whether the *specific role* of engineering coordinator should be included in the petitioned-for unit. *See id.* at 1097-98. In *Caesar's Tahoe,* the Board opined:

> Because the express language of the stipulation neither specifically includes nor specifically excludes the classification of Engineering Coordinator, the parties' intent with regard to the position is unclear . . . Here, the hearing officer correctly noted 'that the position of engineering coordinator is not set forth expressly in either list of included or excluded classifications.'

Id.

Notably, even though it found a portion of the parties' agreement to be ambiguous, the *Caesar's Tahoe* Board did *not* find the agreement as a whole to be ambiguous. Here, by filing its Request, the Union wants to give false life to their misclassification arguments regarding employees Sonja Roberts, Emma Naranjo and Madelynn Martinez. In the present case, none of

the titles are ambiguous or contested by the Parties. Sonia Roberts at the relevant time period was a Shoe Sales Associate. As the Hearing Officer noted in Board Exhibit 1(a), the Union does not seek to represent sales employees in the instant petitioned-for unit and "the community of interest between sales employees and other classifications will not be litigated at the hearing." Further, as the Union conceded, Shoe Sales Associates are classified as salespeople, and therefore are not included in the petitioned-for unit or the Agreement. Union Post-Hearing Brief, at 23. Emma Naranjo and Madelynn Martinez were VP Merchandising Associates. Tr. 86:23-25; Tr. 44:7-9. The Parties clearly agreed in the Agreement to exclude VP Merchandising Associates, including Naranjo and Martinez. RD Decision, at 1.

The ambiguous language at issue in this case relates *only* to the "also eligible to vote" provision, which was determined to explain the eligibility formula; it does *not* relate to employee job titles or job duties. To circumvent this, the Union attempts to cast doubt on the entirety of the Agreement to avoid the *Butler Asphalt* analysis, which is inappropriate. Since there is no ambiguity as to the job titles or duties here, the Hearing Officer correctly applied the *Butler Asphalt* standard and found the Union did not provide evidence of gerrymandering. As such, there was no need to look "behind" these employee's job titles and examine the work performed. Thus, the Union's Request must be denied.

IV. CONCLUSION.

For the foregoing reasons, the Board should deny the Union's Request. Globally, the Union's Request is improper because it fails to provide a self-contained Request and forces the Board to largely assume facts that are not in the record to make its determination. Further, as correctly confirmed by the Regional Director, the Hearing Officer used the correct standard under *Boeing* and properly weighed all the community of interest factors and did not give extra

weight to any of the factors. The majority of the factors weighed against finding a community of interest and the Region correctly found that JC Support colleagues were properly excluded from the unit.

Additionally, the Regional Director properly agreed that the Hearing Officer found that the "also eligible" phrase in the Parties' Agreement did not include all employees who performed unit work, but instead set forth the *Davison-Paxon* formula for determining part-time eligibility.

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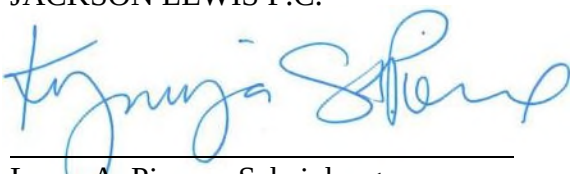
Finally, the Regional Director agreed that the Hearing Officer properly concluded that because the Parties' Agreement was unambiguous regarding the classifications of Roberts, Naranjo, and Martinez, *Butler Asphalt* applied, and the Union failed to provide evidence of gerrymandering to require the Region to look beyond the employee's job title. As such, the job classifications of the contested employees were accepted.

Thus, based on the record, the Board should affirm the RD Decision and deny the Union's Request.

Respectfully submitted,

JACKSON LEWIS P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, I caused the foregoing *STATEMENT IN OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION* to be filed with the Office of the Executive Secretary/Board, using the CM/ECF system.

I further certify that I caused a copy to be served via electronic mail upon the following:

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